SUPREME COURT, U. S.
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RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1275

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TRANSCONTINENTAL GAS PIPE LINE CORPORATION

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March 22, 1974

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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BRIEF IN OPPOSITION FOR RESPONDENT TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Transcontinental Gas Pipe Line Corporation (Transco), a respondent herein and a petitioner in the court below, opposes the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-described proceeding.

QUESTION PRESENTED

In a case where the Federal Power Commission relied almost exclusively on the contract rights of the private parties, the question presented is whether, under the abandonment provision (Section 7(b)) of the Natural Gas Act, the Court of Appeals was correct in requiring the Federal Power Commission to consider, evaluate and balance all relevant public interest factors.

COUNTERSTATEMENT OF THE CASE

This case involves a factual situation, which is *sui generis* in the history of the natural gas pipeline industry and Federal Power Commission (FPC or Commission) regulation of that industry, where one pipeline company, Natural Gas Pipeline Company of America (Natural), contracted with producers thirteen years in advance to take away natural gas then being sold to another pipeline company, Transco, at the end of the primary term of Transco's contract with the same producers.

The first contract for the sale of gas to an interstate pipeline from the La Gloria Field, in Texas, was executed in 1947 between the La Gloria producers and Transco. As amended in 1949, prior to initial delivery, this contract provided for the sale of up to 81,000 Mcf [1] per day to Transco for the standard period of twenty (20) years from the date of first delivery. Article XIV of the contract provided for the sale of "surplus gas" to others, subject to a specific reservation of Transco's prior right to purchase 81,000 Mcf per day (R. 126, 127).[2]

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[1] An Mcf denotes one thousand cubic feet of gas.

[2] Reference "R." is to the record certified to the court below.

In 1950, Natural's predecessor (Texas Illinois Natural Gas Pipeline Company) entered into a contract with the La Gloria producers to purchase the surplus gas. Thereafter, upon the issuance of the landmark *Phillips* decision by this Court,[3] which held producers to be subject to the Natural Gas Act, the La Gloria producers attempted to invoke an "escape clause" in their contract with Natural and terminate deliveries to Natural. Natural counterattacked that the producers were not delivering the full quantities of gas to which Natural was entitled. In order to resolve these disputes, Natural and the producers entered into a new contract in 1958, which they termed a "settlement agreement," under which, *inter alia,* Natural's stated contract quantity was reduced in line with the surplus volumes of gas realistically available to it, Natural agreed to increase the price payable to the producers, and the producers agreed to sell to Natural the 81,000 Mcf then being sold to Transco after Transco's primary term expired in 1971. The agreement specifically recognized that the producers would later have to seek abandonment authority from the FPC (but would not have to appeal an adverse decision) (R. 1434, 1435); and, in approving the new arrangement, the Commission specifically provided that it was not waiving the requirements of Section 7 of the Act and that the authorization was without prejudice to any future proceedings involving the parties. 20 FPC 208, at 210. Transco took no part in the discussions between the producers and Natural, and Transco was not a party to the new agreement (J.A. 1, 2).[4] Because its contract

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[3] *Phillips Petroleum Co.* v. *State of Wisconsin,* 347 U.S. 672, 74 S.Ct. 794 (1954).

[4] Reference "J.A." is to the Joint Appendix in the court below.

rights were not affected and no abandonment against it was then being sought or granted, Transco did not oppose authorization for the new arrangement.

This, then, is the background of the abandonment applications to cease deliveries to Transco which were filed by the La Gloria producers in early 1971. Approximately seven months after the applications were filed, the Commission issued its order setting the matter for hearing, and at the same time, apparently recognizing that the case would be hotly contested, attempted to avoid a meaningful record on relative needs by asserting *ex parte* that the two competing pipelines need "additional as well as existing gas supplies" and advising that "[t]he parties . . . need not make an issue of the question of need for gas supplies by either pipeline company or its customers" (J.A. 49).

This attempt by the Commission to avoid evidence on and consideration of public interest factors failed, at least at the hearing level. In the face of all prior Commission and Court pronouncements regarding the scope of statutory responsibility in abandonment proceedings, the Presiding Examiner permitted a limited record to be made on the issue of relative needs and certain other public interest factors. After hearings held in October, 1971, the Presiding Examiner issued his decision denying the abandonment. As the court below correctly stated:

> "Based upon an extensive and careful review of the evidence, the Presiding Examiner found, *inter alia,* that Transco had greater need for the La Gloria field gas than Natural."[5]

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[5] For the convenience of the Court, the Examiner's findings on comparative needs are excerpted from the record and set forth in Appendix A hereto.

The Commission, however, reversed. Without disturbing or in any way disagreeing with the findings of the Examiner, the Commission held that "comparison of pipeline needs in times of shortage is a prodigious undertaking" and that, in any event, the standard was defective (J.A. 117). Without explaining the defects in the standard, the Commission proceeded to formulate a new standard under which private contract rights would be given controlling weight absent "compelling proof" on the part of the opponents of abandonment of "unequivocal public necessity" which would require denial of the abandonment.

Upon appeal, the court below reversed and remanded the case to the Commission. The court, while recognizing contract rights as one factor in the balancing process, held that:

> "Rigid deferral to contractual arrangements without a searching inquiry into other factors relevant to the public interest as required by Section 7(b) simply is an inadequate means to assure vindication of the transcendent interests of the public."

The court then listed certain *public interest* factors which had been raised by the parties, including comparative needs of the two pipeline systems, the environmental effects of the decision,[6] the economic effect on the pipelines and their consumers, the presumption in favor of continued service and the relative diligence of the respective pipelines in providing for adequate supplies,[7] which the court contemplated would be among

[6] In its brief to the court below, the Commission conceded that the procedures mandated by the National Environmental Policy Act of 1969 (NEPA) had not been followed by the Commission.

[7] This factor had been urged by Natural and its supporters but, like the others, was ignored by the Commission.

the subjects of a "searching and comprehensive inquiry . . . into all factors relevant to determining the overall public interest . . ." on remand. (Pet., p. A10-11).[8]

The Commission itself has chosen not to seek further review of the Court of Appeals' decision, and has indicated by its order of February 22, 1974 that it intends to carry out the mandate of that court for further proceedings. Natural, one of the intervenors supporting the Commission in the court below, alone has petitioned for a writ of certiorari.

REASONS FOR DENYING THE WRIT

As shown below, the reasons for denying the writ are twofold: (1) the decision below is clearly correct, and (2) there is no substantial question warranting this Court's attention.

I

THE DECISION BELOW IS CLEARLY CORRECT

Natural's principal argument in support of certiorari is that the Court of Appeals improperly "substituted its judgment for that of the Commission," and thereby exceeded the permissible bounds of judicial review of administrative agency action. The factual premise which underlies Natural's argument is that the comparative needs of the two rival pipeline systems were viewed by the Commission as "approximately equal" or "indecisive." Assuming the validity of that premise, Natural argues that the Commission was justified in ignoring comparative needs and relying instead on other factors, principally private contracts, for its decision.

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[8] Reference "Pet." is to the petition for writ of certiorari.

The Court of Appeals, however, did *not* substitute its judgment for that of the Commission on any factual issue. What the court below did was simply rule that the Commission must follow the statutory mandate of evaluating the "public convenience or necessity" and could not, therefore, as a matter of law, ignore relevant public interest factors in reaching its determination on abandonment of service. The court was clearly correct in its conclusion that the statutory public interest standard called for a broadly based inquiry, which was not satisfied by merely deferring, as the Commission did, to private contractual arrangements. The court pointed to a number of public interest factors, including comparative needs, that were ignored by the Commission but should be considered in the remanded proceedings.

Moreover, Natural's factual premise of "approximately equal" needs is wholly false. The Presiding Examiner, based on the record evidence, found that Transco had greater need than Natural for the contested La Gloria supplies (see Appendix A), and the Commission, while taking no issue with such factual findings, simply rejected that factor in deciding the case.

A. The Court of Appeals Did Not Exceed the Scope of Judicial Review by Requiring the Commission To Consider Public Interest Factors Which Had Been Ignored.

The Court of Appeals vacated and remanded this case because the Commission, in placing almost exclusive reliance on private contracts for its approval of abandonment, failed to consider adequately and fully a number of other public interest factors which are clearly relevant in the context of this case.

Natural argues that the Court of Appeals exceeded its judicial review powers by requiring the Commission to consider comparative needs as a public interest standard of primary importance in the remanded proceedings (Pet., pp. 7-9). Natural concedes that comparative needs "is an element in this case in determining the public convenience and necessity" (Pet., p. 9), but its differences with the court below appear to be twofold: (1) that the court below was mandating consideration of comparative needs to the exclusion of other factors, and (2) that the Commission actually considered comparative needs and recognized such needs to be "about equal."

Natural is wrong on both counts. First, the whole thrust of the decision below is to direct the Commission's attention to any and all relevant public interest factors and not to be mesmerized by private contract considerations as it had been in Opinion No. 655. Clearly, the court below did not countenance reliance on any one factor to the exclusion of others, and its decision cannot fairly be so interpreted. While the court below did consider relative needs to be a prime factor, the court made no attempt to tell the Commission how much weight to place on this factor since its importance in the balancing process would require, in the first instance, that the Commission address the issue and determine initially the degree of need by the respective competitors. Moreover, the very case principally relied upon by Natural, *FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 75 S.Ct. 855 (1955) demonstrates the fundamental proposition that relative need is always a key issue in deciding competitive applications under public interest statutes. Indeed, the Federal Power Commission itself previously recognized that basic proposition in *Michigan Consoli-*

dated Gas Co. v. *FPC,* 283 F.2d 204 (CADC, 1960), *cert. denied,* 364 U.S. 913, 81 S.Ct. 276 (1960).

In requiring a broader examination of the public interest than was evidenced by the Commission's reliance in Opinion No. 655 on private contractual arrangements, the Court of Appeals was clearly on firm ground. The court reiterated the principle stated in *Michigan Consolidated* that:

> "Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors." 283 F.2d at 226.

This principle finds ample support in decisions of this Court. For example, in *Atlantic Refining Co.* v. *Public Service Commission of New York,* ("CATCO"), 360 U.S. 378, 79 S.Ct. 1246 (1959), this Court stated that "§7(e) requires the Commission to evaluate all factors bearing on the public interest." 360 U.S. at 391, 79 S.Ct. at 1255. Clearly, Section 7(b) here involved requires no less. The Court went on to say that, based on the facts there presented, price was a consideration of "prime importance." The Supreme Court reiterated this principle in *FPC* v. *Transcontinental Gas Pipe Line Corporation,* 365 U.S. 1, 81 S.Ct. 435 (1965), stating that "the term 'public convenience and necessity' connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination." 365 U.S. at 23, 81 S.Ct. at 447. In *Transcontinental,* the Court also cited with approval *City of Pittsburgh* v. *FPC,* 237 F.2d 741 (CADC, 1956), as an example of "the

cases which have held that it was error for the Commission to refuse to consider certain factors within its power of notice." *Ibid,* at n. 19. Thus, there is a clear line of authority in the decisions of this Court for the action of the court below in vacating and remanding the case for consideration of relevant public interest factors which had erroneously been ignored.

Turning to the factors enumerated by the court below for further consideration on remand, there can be no question that they are relevant to the public interest determination; indeed, Natural does not contend otherwise. Clearly, if the comparative needs standard was relevant in the context of the *Michigan Consolidated* case involving a dispute as to which of two competitive markets would be authorized to receive *additional* gas service, it is *a fortiori* relevant in an abandonment application where, as here, Transco's existing customers would suffer a deprivation of *existing* service if abandonment were approved. Likewise, the other factors listed by the court, namely, environmental and economic impacts, the presumption in favor of continued service, the relative diligence of the respective pipelines in providing for adequate gas supplies (a factor urged by Natural), and the weight to be accorded to private contracts and settlements are also relevant to the public interest determination.

Natural also contends that the Court of Appeals erroneously rejected the principle that contracts should be honored by a regulatory agency absent circumstances of "unequivocal public necessity," and, therefore, its decision is in conflict with this Court's decision in *Permian Basin Area Rate Cases,* 390 U.S. 747, 88 S.Ct. 1344 (1968). Natural cites *Permian* as though it announced a new legal doctrine applicable to

proceedings under the Natural Gas Act. However, as shown by the opinion, 390 U.S. at 779, 822, 88 S.Ct. at 1366, 1389, *Permian* merely applied to independent producers the proposition which the Court had long ago announced for pipelines in proceedings under Sections 4 and 5 of the Act in *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 76 S.Ct. 373 (1956). That doctrine is that private parties will not be relieved of improvident bargains in seeking rate relief under Sections 4 and 5 of the Act absent a showing of "unequivocal public necessity." However, this Court has held that such doctrine is inapplicable to proceedings under Section 7(b) of the Act. In *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 80 S.Ct. 1392 (1960), this Court flatly rejected the argument that the continuing obligation to provide service under the statutory scheme of Section 7(b) was in any way diminished or circumscribed by private contractual provisions. Referring to the doctrine of *Mobile* regarding the integrity of private contracts *as between the parties thereto,* this Court ruled in *Sunray* that the *Mobile* doctrine was "simply beside the point" in a Section 7(b) abandonment situation. 364 U.S. at 155, 80 S.Ct. at 1403. It would seem to belabor the obvious that a contrary holding would essentially reduce the Commission's function to that of an arbiter of contract rights and obligations, a function which would not require the creation of an administrative agency. In this regard, the Commission itself had always heretofore held that contract rights are *not* dispositive of the public interest in abandonment proceedings.[9]

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[9] See, e.g., *Trunkline Gas Co.*, 31 FPC 1118, 1120, 1121 (1964); *Harper Oil Co.*, 23 FPC 2, 3 (1960); *Cabot Gas Corporation*, 3 FPC 582 (1943); and *United Gas Pipe Line Co.*, 3 FPC 3, 9 (1942).

In summary, decisions of this Court amply demonstrate the correctness of the Court of Appeals' decision requiring the Commission to consider *all* relevant public interest factors, as well as its subsidiary ruling that private contracts are not to be accorded dispositive weight in abandonment proceedings. Accordingly, the decision of the court below is clearly correct.

B. Natural's Assertion That the Commission "Recognized" That the Comparative Needs of the Two Rival Pipeline Systems Were "About Equal" Is Untenable.

As noted above, Natural concedes that comparative needs is an element of the public interest in this case. Natural, however, would have this Court believe that the Commission actually considered the issue adequately and fully. Natural asserts that the Commission "was fully aware of the great need of both pipelines for the gas supply in question, a need that was about equal" (Pet., p. 9), and therefore recognized that "comparative need was not a controlling element" (Pet., p. 10). Natural's assertion is without merit.

The Commission's own statements concerning its approach to this proceeding belie Natural's assertion that the Commission made *any* determination of comparative need, much less one of "approximately equal" need. In view of the facts that the Commission (1) first attempted to dissuade the parties from making a record on comparative needs in its *ex parte* order setting the matter for hearing (J.A. 49), and (2) thereafter in its decision assailed the comparative needs standard as a "prodigious undertaking" replete with unspecified "substantive defects"[10] (J.A. 117), it is

[10] Of course, it is one thing to allege "substantive defects" in the comparative needs standard, but quite another to provide an explanation to substantiate the sweeping allegation. The Commission has never done so.

utterly astonishing that Natural now claims that the Commission considered the question and somehow "recognized" that the comparative needs of the two pipelines were "about equal."

The Commission was satisfied that both pipelines had a need for additional gas supplies and was content to let the matter lay without further inquiry (see J.A. 49 and 118, ¶ 31). In sharp contrast to the broad brush conclusion of the Commission to the effect that everybody needs gas during this period of gas shortage is the careful analysis of the evidence and the specific finding of the Presiding Examiner that "while Transco's customers are experiencing an *actual curtailment* of gas, Natural's customers are *unable to add additional load* within contract demand" (J.A. 96, Appendix A, p. 1a, emphasis supplied). Thus, Transco's existing customers were being cut back from the level of deliveries which they had previously experienced, whereas Natural's customers were only being denied *new* annual volumes within the maximum daily quantities specified in their contracts with Natural. This critical difference in the comparative needs of the customers of the two rival pipeline systems was the basis for the Examiner's conclusion that Transco had greater need than Natural for the La Gloria supplies (J.A. 101, see Appendix A). Natural's contrary assertion (Pet., p. 4) that the Examiner "found the relative needs were quite evenly balanced" is a blatant misrepresentation of the Examiner's express findings.

Surely where the Presiding Examiner heard the evidence, analyzed it and made specific findings and determinations, the Commission has an obligation to explain and articulate its differences with the Ex-

aminer, if indeed it has any. The Commission did not disturb or overturn the Examiner's findings on relative need, but simply rejected comparative needs as a public interest standard in this case. There can be no doubt that the Commission made no express "finding" to the effect that the two pipelines had equal need, nor did the Commission, as Natural would now have it, somehow recognize *sub silentio* that the needs were "about equal."

It is also pertinent to note that Natural is now advancing a position to this Court which is diametrically at odds with its earlier statement to the court below. In its brief to the Court of Appeals, Natural stated that "[a]pplying the proper test, the *Commission was not required to, and did not, reach the question of which pipeline had greater need*" (Natural's Brief, p. 38, emphasis supplied). The other intervenors in support of the Commission expressed the same view. Understandably, Natural offers no explanation as to how the Commission could have determined that needs were "about equal" when it never reached the question. Thus, for the above reasons, Natural's factual predicate of "approximately equal" needs is conclusively negated.

Natural's erroneous factual predicate attempts to lay the foundation for its reliance on *FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 75 S.Ct. 855 (1955), for the proposition that no single factor should be viewed as determinative of the public interest, and that when a factor such as comparative needs, however important it may be, does not really distinguish two applicants, the agency may turn to factors which might not otherwise be decisive (Pet., pp. 10-11).

This Court's decision in *Allentown,* however, reveals no error in the decision of the Court of Appeals in the instant case. The short answer to Natural's reliance on *Allentown* is that the Commission here never reached a determination of the comparative needs issue, as we have shown above. In any event, this Court's decision in *Allentown* took note of the fact that the Federal Communications Commission "first determines which community has the greater need for additional services . . ." 349 U.S. at 361, 75 S.Ct. at 858. It then concluded, contrary to the lower court, that substantial evidence supported the FCC's determination that Easton had greater need because Easton did not have the competitive broadcast service which already existed in Allentown. 349 U.S. at 363, 75 S.Ct. at 858. Thus, the *Allentown* decision, far from undermining the decision below, confirms the error in the FPC's refusal to consider comparative needs of Transco and Natural as an important public interest factor in the instant case.

II

THE DECISION BELOW DOES NOT RAISE A SUBSTANTIAL QUESTION WARRANTING THIS COURT'S ATTENTION

The importance of this case lies in the assurance that the Federal Power Commission will be required, under the decision of the court below, to carry out its statutory responsibilities of protecting the public interest rather than abdicating those responsibilities by deferring to private contracts. And it would seem clear that the very fact that there is today a pervasive natural gas shortage should require more diligence on the part of the Commission to assure that existing captive consumers are not deprived of their present

supplies by predatory practices of others, rather than permitting the Commission to shrink from its responsibilities because it claims that an evaluation of the public interest is a "prodigious undertaking" in times of supply shortage.

Beyond this, the case neither establishes any new legal principles nor violates any already established. Because of the dearth of findings by the Commission on evidentiary matters and the failure to provide reasoned conclusions, there is really nothing for this Court to review. Natural does not claim that the Commission's decision is supported by substantial evidence and it could not because the Commission simply ignored the evidence that was produced. Natural's petition boils down to the proposition that the Commission may set any standard for abandonment it chooses in the name of a "policy" decision and the courts may not interfere, even if the standard is one of private contract rights as in this case, rather than the standard of "public convenience or necessity" provided in the governing statute.

Moreover, if the Court should take this case, it would be considering the decision of the court below in a vacuum. While Natural quibbles with the words "primary importance" as used by the court below in relation to the issue of relative needs (an undisputed public interest factor), we would similarly quibble with the words "significant weight" which the court below used in connection with contract rights. Until an adequate record has been made and the Commission has made sufficient findings of fact on all relevant issues and performed the balancing function which is required in evaluating the total public interest, there is simply

no framework within which to review this case further. The Commission itself, which has not sought review in this Court, apparently agrees.

CONCLUSION

The petition for a writ of certiorari should be denied.

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March 22, 1974